BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONDA K. HUBBARD	)	
Claimant	)	
v.	)	
	)	Docket No. 1,062,412
ST. FRANCIS HEALTH CENTER	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the July 23, 2014, Amended Award by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on November 19, 2014.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Bret C. Owen, of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

In her application for hearing, claimant alleged she was injured on July 18, 2012, caused by "[p]rolonged standing on hard floors in course of employment over long period of time." On February 6, 2014, claimant filed an amended application for hearing, alleging a series of repetitive trauma from June 17, 2012, to July 17, 2012, caused by "repetitive standing on hard floors, bending and stooping in course of work."

The ALJ found claimant did not sustain personal injury by accident arising out of and in the course of her employment. The ALJ also found respondent was not given timely notice of the alleged July 18, 2012, injury by accident.

Claimant argues she proved personal injury by accident arising out of and in the course of her employment and that her accident was the prevailing factor causing her injury, medical condition and disability or impairment. Claimant contends she provided

timely notice and respondent had actual knowledge of the injury. Claimant maintains she sustained a 16 percent permanent impairment of function to the whole body and a 65 percent work disability. Claimant argues she is entitled to unauthorized and future medical compensation.

Respondent argues the ALJ correctly found claimant did not prove personal injury by accident arising out of and in the course of her employment and claimant did not prove respondent received timely notice. If claimant's claim is determined to be compensable, respondent asserts claimant's wage loss was caused by her voluntary resignation or termination for cause, thus limiting permanent partial disability (PPD) benefits based on claimant's functional impairment, per Dr. Geis' 5 percent whole body functional impairment rating. Respondent contends claimant should be denied future and unauthorized medical compensation.

The issues presented to the Appeals Board are:

1. Did claimant sustain personal injury by accident or repetitive trauma arising out of and in the course of her employment?

2. Was the alleged accident or repetitive trauma the prevailing factor causing claimant's injury, medical condition and disability or impairment?

3. Was timely notice of the injury by accident given to respondent?

4. What is the nature and extent of claimant's disability?

5. Is claimant entitled to unauthorized and future medical compensation?

FINDINGS OF FACT

Claimant, a certified nurses aide (CNA), began working for respondent as an emergency department technician on April 23, 2012. That position required claimant to register incoming patients, assist with EKGs, catheterize patients, draw blood, stock supplies, clean rooms and transport patients within the hospital. Claimant worked from 7:00 a.m. to 7:00 p.m., with half an hour for lunch. Except for lunch breaks, claimant was on her feet throughout her shift, and was required to bend, lift and push.

Claimant testified that when she went to work for respondent, she had no restrictions and was able to work full duty. Claimant claimed she began to experience back pain about a month after she started working for respondent and the pain worsened over time.

Around July 1, 2012, claimant met with respondent's director of emergency services, Paul Leavens, about her job performance. Mr. Leavens testified he encouraged her to apply for other CNA positions in the hospital.

On direct examination, claimant testified she initially talked about her back pain to her charge nurse, Rachel Seitz, approximately the week prior to July 17, 2012.[1] According to claimant, Ms. Seitz, asked her why she was wearing a gait belt, to which claimant responded her work caused her back pain. Claimant asserted she was told she would have to get used to the work. On cross-examination, claimant was asked when she talked to Ms. Seitz about her low back problems, to which claimant responded: "I can't give an approximate day because I don't remember the days that I was working and the days that I wasn't working."[2]

Nurse educator Mendy Crump testified that on July 12, 2012, claimant decided she could no longer perform the emergency department technician job, and respondent agreed to allow claimant two weeks to find another position she could perform.

While working on July 17, 2012, claimant claimed her back was getting tired and fatigued. She testified that on that date, she performed her work on her feet and did "a whole bunch of bending, lifting and pushing and all that."[3] On July 17, she was wearing a gait belt she had worn for "a couple of days."[4] Claimant did not testify she sustained any specific traumatic event causing her injury. She testified she performed her normal duties on July 17, 2012.[5]

On July 18, 2012, claimant asserts she woke up and could not move. She was not scheduled to work that day. Claimant did not request medical treatment from respondent.

On July 20, 2012, claimant was scheduled to work. She called Ms. Seitz and told her she had been to the Stormont-Vail Hospital emergency room for problems with her back, hips and pelvis. The emergency room doctor gave claimant a note taking her off work. Claimant did not tell Ms. Seitz her job caused her symptoms,[6] but claimant testified she previously told Ms. Seitz about her back on more than one occasion. Ms. Crump

---

[1] R.H. Trans. at 12-13.

[2] *Id*. at 56.

[3] *Id.* at 8-9.

[4] *Id.* at 11.

[5] *Id.* at 9.

[6] *Id.* at 14-15.

testified she was unaware of a work accident involving claimant's back, nor was she aware if claimant had complained of having back pain while performing her job. Ms. Crump asked claimant if she had injured her back at work, to which claimant responded she had not. Claimant testified she talked to Ms. Crump about her back discomfort, but did not tell Ms. Crump she had hurt her back at work.

Claimant returned to work on July 24, 2012, but only worked that day until 3:00 p.m. On July 25, 2012, claimant told respondent she had not found another position in the hospital, following which claimant says she was terminated. Mr. Leavens told claimant if other employment opportunities became available at the hospital, she was encouraged to apply.

Claimant testified that Mr. Leavens and Ms. Seitz knew her back was bothering her from work.[7] However, Mr. Leavens testified he did not know about claimant's injury until after claimant's last day of work for respondent on July 25, 2012. Ms. Seitz did not testify.

Mr. Leavens testified he did not interact with claimant on a day-to-day basis, but saw her periodically. He asserted that after claimant resigned, he learned about claimant's alleged injury when the hospital administrator, Jerry Jones, called him to ask if he was aware of claimant's work injury. Claimant did not report to Mr. Leavens she had sustained an injury while working for respondent. According to Mr. Leavens, prior to July 25, 2012, other employees did not inform him claimant was injured while working, but he knew she brought in an off-work slip from Stormont-Vail ER.

Claimant sought and received conservative treatment on her own for her back symptoms. Claimant's health insurance paid for claimant's treatment.

Claimant testified she presently has back pain every day when bending, stooping, climbing stairs, walking, driving and doing housework. Claimant stated when not doing anything, her back pain is a six or seven on a pain scale of one to ten. Claimant testified she takes Naproxen, Flexeril and Lyrica. At the regular hearing, claimant was receiving treatment from a nurse practitioner at the Topeka Shawnee County Health Agency.

Beginning March 5, 2013, claimant worked for Futures for Tomorrow, for one week, 40 hours per week, at $10 an hour. Claimant worked only one week because the job required repetitive work that aggravated her injuries. From May 28 to August 9, 2013, claimant worked part-time for Boy Scouts of America, four hours a day, 20 hours per week, earning $7.25 per hour.

Claimant was denied unemployment benefits, but that denial was reversed on appeal. Claimant applied for jobs and went to several interviews. She stopped applying

---

[7] *Id.* at 23.

for jobs because she was receiving medical treatment for carpal tunnel syndrome and ulnar nerve disorders in her elbows, conditions unrelated to her work. Claimant was not working when she testified at the regular hearing.

Daniel Zimmerman, M.D., an internist, examined claimant on October 18, 2012, at the request of her attorney. Dr. Zimmerman testified claimant told him that on July 18, 2012, she injured her low back at work lifting a 32 to 33 gallon bag. Dr. Zimmerman's narrative report reflects claimant told him that "[w]hen she attempted to throw the bag into the utility closet, she had severe pain and discomfort affecting the lumbosacral spine with radiating pain toward the right lower extremity."[8] The doctor found the prevailing factor for claimant's permanent aggravation of lumbar disc disease at L4-L5 was the accident of July 18, 2012.

Utilizing the range of motion model from the AMA *Guides*,[9] Dr. Zimmerman rated claimant's permanent functional impairment at 16 percent of the body as a whole.

Dr. Zimmerman imposed restrictions to avoid lifting in excess of 20 pounds occasionally and 10 pounds frequently; frequent flexing of the lumbosacral spine; and frequent bending, stooping, squatting, crawling, kneeling and twisting. Zimmerman opined claimant could no longer perform 8 of 27 work tasks, for a task loss of 30 percent.[10]

Dick Geis, M.D., examined claimant at the request of respondent's attorney on January 30 and February 20, 2013. Claimant told Dr. Geis she developed back pain lifting a 32 or 33 gallon bag at work. Dr. Geis' report indicates:

> Ms. Hubbard denied prior injury to or problem with her lower back, before 7/18/2012.
>
> . . .
>
> I asked Ms. Hubbard when she began to feel pain in her lower back[.] I noticed Dr. Zimmerman indicated she developed pain lifting a 32 or 33 gallon bag at work. The ER report indicates the patient went home after her work shift[,] slept and then awakened with severe low back pain. In a rambling response to this question[,] Ms. Hubbard stated that her back always hurt after a work shift and wasn't aware of any one particular incident at work that might be the cause of her pain.[11]

---

[8] Zimmerman Depo., Ex. 2 at 4.

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[10] The task list was compiled by vocational counselor Dick Santner, who testified by deposition.

[11] Geis Depo., Ex. 2 at 3.

Dr. Geis diagnosed a lumbar muscle strain with preexisting lumbar degenerative disc disease. Dr. Geis opined that "[a]lthough [claimant] had pre-existing lumbar degenerative disc disease and the exact history of injury and pain onset are somewhat variable,"[12] the prevailing factor causing claimant's injury, necessitating treatment and responsible for any impairment, was the claimant's injury at work for respondent.

Dr. Geis testified he used the DRE method in the AMA *Guides* to determine claimant's impairment rating. Dr. Geis opined, pursuant to DRE Category II, claimant sustained a 5 percent whole body permanent functional impairment. Dr. Geis imposed no permanent restrictions.[13]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur

---

[12] *Id.* at 6.

[13] Respondent secured a vocational evaluation by rehabilitation counselor Terry Cordray, who testified by deposition. Mr. Cordray identified 29 work tasks performed by claimant in the five years before claimant's alleged injuries. There is no evidence the task list was reviewed by Dr. Geis.

during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The Board finds the ALJ correctly concluded claimant did not sustain her burden to prove personal injury by accident or by repetitive trauma, arising out of and in the course of her employment. The reasons for the Board's decision are:

1. The evidence does not establish when or how claimant sustained personal injury by accident. Claimant's original application for hearing alleged the accidental injury occurred on July 18, 2012. Claimant's testimony at the regular hearing indicated her accidental injury took place on July 18, 2012.[14] However, claimant did not work on July 18, 2012. Claimant also testified she was injured performing her regular duty on July 17, 2012. Claimant told Dr. Geis she began to feel low back pain on July 18, 2012, but she also testified her back pain began in approximately May 2012. Claimant told Dr. Dr. Zimmerman she was injured lifting a 32 to 33 gallon bag, but in her testimony, claimant

[14] R.H. Trans. at 7-8.

mentioned nothing about lifting a bag. Claimant told Dr. Geis and Stormont Vail ER personnel, on July 18, 2012, that she always experienced back pain after a work shift and that she was unaware of any particular incident having caused her pain.

2. The evidence does not establish claimant sustained an injury by repetitive trauma. Claimant's original application for hearing filed on September 19, 2012, alleged an injury by accident on July 18, 2012. The amended application for hearing, which changed claimant's date of injury to a repetitive trauma from June 17, 2012, to July 17, 2012, was not filed until February 6, 2014, about two months after the regular hearing. Neither Dr. Zimmerman nor Dr. Geis expressed the opinion that claimant was injured by repetitive trauma or that any repetitive trauma was the prevailing factor causing claimant's injury, medical condition or resulting disability or impairment.

3. Claimant could point to no traumatic event causing her injury. Accordingly, claimant did not prove she sustained an "accident" as that term is defined in the Act. Claimant also has not proven she sustained injury by repetitive trauma because the Act requires the trauma must cause injury as a result of repetitive use, cumulative traumas or microtraumas. Neither Dr. Zimmerman nor Dr. Geis opined claimant's injury resulted from repetitive use or cumulative trauma.

4. In response to an inquiry from Ms. Crump, claimant denied she injured her back at work.

Given the Board's findings, the other issues raised by the parties are moot and will accordingly not be addressed by the Board.

CONCLUSIONS

1. Claimant has not sustained her burden to prove personal injury by accident, or by repetitive trauma, arising out of and in the course of her employment.

2. Claimant has not sustained her burden to prove her accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Amended Award of Administrative Law Judge Rebecca A. Sanders dated July 23, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
debbieb@ksjustice.com
rdfincher@ksjustice.com
Tammy@ksjustice.com

Bret C. Owen, Attorney for Respondent and its Insurance Carrier
boc@boc.kscoxmail.com

Rebecca A. Sanders, Administrative Law Judge